Supreme Court, U.S.
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In The

Supreme Court of the United States

BRENDA SLONE McGEE, individually,
and BRENDA SLONE McGEE, as executrix
of the estate of JAMES SLONE,

Petitioner,

-v.-

THOMAS WAYNE MARCUM,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit misapplied this Court's decision in *Geiger v. Kawaauhau,* 523 U.S. 57 (1998) in finding that 11 U.S.C. § 523(a)(6) does not prevent discharge in bankruptcy of a wrongful death judgment stemming from a willful violation of a federal mine safety statute designed to prevent such death.

LIST OF ALL PARTIES

1. The Petitioner is Brenda Slone McGee, individually, and Brenda Slone McGee, as executrix of the estate of James Slone, with her attorney being Leonard Stayton, Attorney at Law, P.O. Box 1386, Inez, KY 41224.

2. The Respondent is Thomas Wayne Marcum, with his attorney being Hon. David G. Perdue, Attorney at Law, 107 South Main Street, P.O. Box 968, Winchester, KY 40392.

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McGee v. Marcum, et al., Floyd Circuit Court, Floyd County, Kentucky, 4/11/02

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

This Petition for Writ of Certiorari is from an opinion of the United States Court of Appeals for the Sixth Circuit as entered on May 23, 2006. The statutory basis for jurisdiction for this Petition for Writ of Certiorari is 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN CASE

11 U.S.C. § 523(a)(6)

"A discharge under 11 U.S.C. § 727, 11 U.S.C. § 1141, 11 U.S.C. § 1228(a), 11 U.S.C. § 1228(b), or 11 U.S.C. § 1328(b) of this title does not discharge an individual debtor from any debt for willful and

malicious injury by the debtor to another entity or to the property of another entity."

STATEMENT OF THE CASE

Procedural History

This appeal arises from an adversary proceeding filed by the appellant, Brenda Slone McGee, individually, and Brenda Slone McGee, as executrix of the estate of James Slone, against the debtor, Thomas Marcum. (Docket Number hereinafter "DN" I, Complaint, 3/19/04, Apx. pg. 16-28; DN 8, Amended Complaint, 4/15/04, Apx. pg. 73-75). The adversary proceeding as filed by the appellant relates to a wrongful death judgment in the amount of $1,255,559.20 which was secured in the Floyd Circuit Court in Floyd County, Kentucky by the appellant against the appellee (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 130-132).

After the filing of a motion for summary judgment by the debtor, Marcum, (DN 18, 31, Marcum Motion for Summary Judgment, 6/18/04, Apx. pg. 79-93), the bankruptcy court dismissed the adversary complaint, ruling that the actions of the debtor, Thomas Marcum, were not willful and malicious under 11 U.S.C. § 523(a)(6) (DN 56, Findings of Fact and Order Dismissing Adversary Proceeding, 8/12/04, Apx. pg. 526-533). On August 30, 2004, the appellant, McGee, filed a Notice of Appeal with the bankruptcy court. (DN 59, Notice of Appeal, 8/30/04, Apx. pg. 534). The district court issued an order on April 20, 2005 affirming the order of dismissal as issued by the bankruptcy court. (DN 9, Order, 4/20/05, Apx. pg. 544-548). The appellant, McGee, filed a Notice of Appeal with the district

court clerk's office on May 16, 2005, appealing the denial of the district court to this court. (DN 10, Notice of Appeal, 5/16/05, Apx. pg. 549-555).

The Sixth Circuit affirmed the U.S. District Court judgment on May 23, 2006. (Order, 5/23/06).

Statement of the Facts

As previously noted, the origin of this matter is a wrongful death action in which judgment was granted in the Floyd Circuit Court in Floyd County, Kentucky. (DN 1, Adversary Complaint, 3/19/04, Apx. pg. 16-28). The wrongful death action stems from a roof fall at a coal mine which was being operated by the appellee, Marcum. Mr. Marcum sent the appellant's husband, James Slone, under unprotected top. A massive roof fall occurred, crushing and killing the appellant's husband, James Slone. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 222-234, 330-363).

In connection with the tragedy, criminal charges were brought by the United States against the appellee, Thomas Marcum, alleging that the appellee, Thomas Marcum, willfully used a method of mining at the Todco No. 1 mine which exposed the decedent, James Slone, to hazards caused by excessive widths of rooms, cross cuts, and entries, and faulty pillar recovery methods in violation of Title 30, Code of Federal Regulations, Section 75.203(a), and Title 30, United States Code, Section 820(d), willfully conducted mining at the Todco No. 1 mine such that the mine roof in areas of the mine where the decedent worked and traveled was not supported or otherwise controlled to protect the decedent from hazards related to falls of the

roof in violation of Title 30, Code of Federal Regulations, Section 75.202(b) and Title 30, United States Code, Section 820(d), willfully conducted pillar mining at the Todco No. 1 mine without the installation of breaker posts and roadside radius (turn) posts or equivalent supports in violation of Title 30, Code of Federal Regulations, Section 75.207(b), and Title 30, United States Code, Section 820(d), willfully conducted pillar mining at the Todco No. 1 mine when there was no approved roof control plan providing for such pillar mining in violation of Title 30, Code of Federal Regulations, Section 75.220(a)(1), and Title 30, United States Code, Section 820(d) and further, Mr. Marcum, with other Defendants, did willfully and knowingly agree, combine, conspire, and confederate together and with each other so as to commit these actions. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 251-253).

The defendant, Thomas Marcum, pled guilty in the U.S. District Court, Eastern District of Kentucky, Pikeville, Kentucky to willful violations of 30 U.S.C. § 820(d). As reflected in the plea agreement of the debtor, Thomas Marcum, Mr. Marcum specifically agreed that his violations were willful. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 254-259).

While Mr. Marcum pled guilty to the charge, Mr. Marcum testified during the trial of one of his codefendants, John L. Cline. During the trial which was held in the U.S. District Court, Eastern District of Kentucky, Pikeville Division, C.A. No.: 93-51 on December 7, 1993 Mr. Marcum testified that his area of responsibility at the coal mine in question, Todco Coal, Inc., was the underground area of the mine. (DN 28, 39, 53, 54, Responses

and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 193).

Mr. Marcum testified that he and the other two other coowners, John Larry Cline and Marion Dalton, Jr., would have weekly meetings in which decisions would be made concerning what actions to take at the mine. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 194).

Mr. Marcum testified at the criminal trial that he had hit bad top before the date of the accident and that the top was too bad to go under. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 194). Mr. Marcum specifically testified that he was aware of the bad conditions. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 194).

Mr. Marcum testified that a decision was made by he and the other owners to rob pillars from the mine. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 194-195). Mr. Marcum further testified that he knew, prior to the accident, that he was supposed to have a roof plan, so he took a short cut as he said he could not financially afford to be down for the few days necessary to get the appropriate approval from the federal government. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 194).

A conspiracy was entered into by Mr. Marcum and the other parties to lie concerning the robbing of pillars at the mine if any federal mine inspectors showed up while the mining was ongoing. Mr. Marcum testified that the plan to lie was to tell the federal mine inspectors that the section

was being moved in the mine and no coal was being run. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 195).

As part of the investigation, a statement was taken from Mr. Marcum's brother, James Marcum, by the supervisor of the Kentucky Department of Mines and Minerals of Pikeville, Kentucky. As reflected at page 13 of James Marcum's statement, the day of the accident the top was getting bad and, according to James Marcum, was "bucking and working." (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 375). James Marcum testified that he advised Thomas Marcum of the dangerous condition of the top. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 375, 385).

The accident investigation report as prepared by John S. South, special investigator of the U.S. Department of Labor Mine Safety & Health Administration reflects, at page 4 of the report, that there was no roof control plan in effect nor was there any roof support installed at the time of the accident. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 340). Furthermore, the accident report as prepared by the Kentucky Department of Mines and Minerals reflects that the company did not submit a plan for approval to engage in retreat mining and further did not install any supplementary or additional roof supports during the retreat mining operations. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5104, Apx. pg. 354).

ARGUMENT

Pursuant to 11 U.S.C. § 523(a)(6) a debtor will not be discharged for willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6). As held by the U.S. Supreme Court in *Geiger v. Kawaauhau,* 523 U.S. 57 (1998) in order to prevent discharge under Section 523(a)(6) it must be shown that the actor desired to cause the consequences of his act or believed that the consequences were substantially certain to result from it, quoting the Restatement Second of Torts, section 8A, at p. 15 (1964).

In the matter at bar, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's opinion that the adversary plaintiff's adversary action based upon the wrongful death judgment did not come within the provisions for nondischargeability as provided for by 11 U.S.C. § 523(a)(6). The court held that as the evidence did not show that Mr. Marcum intended the death of Ms. Slone's husband, then, pursuant to the reasoning of the U.S. Supreme Court in *Geiger,* it would be appropriate to discharge the wrongful death judgment in bankruptcy. (Opinion of U. S. Court of Appeals for the Sixth Circuit, 5/23/06, App. 6).

The adversary plaintiff would submit that the legal basis for discharge in *Geiger* is very different from the manner in which the law should have been applied in the current claim. In *Geiger,* the Court was only concerned with a medical malpractice action in which a patient had secured a malpractice judgment based upon simple negligence against her physician for improper treatment. No allegation was made of any type of criminal intent or action on the part of the physician in *Geiger.*

In the matter at bar, we have a completely different legal situation. In the current matter, Mr. Marcum willfully committed criminal acts which resulted in the death of the plaintiff's husband, James Slone.

The federal mine safety statute which Mr. Marcum was convicted of violating is designed to prevent exactly the type of situation which occurred when Mr. Marcum willfully and illegally sent Mr. Slone under unprotected roof in an underground coal mine. As reflected by the record, Mr. Marcum has a long history in the coal mining industry, having previously served as the president of Sidney Coal Company, a division of A.T. Massey. As such, Mr. Marcum has extensive knowledge of the coal mining industry and was well aware of the danger to which he was subjecting Mr. Slone. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 342).

As reflected by the testimony of Thomas Marcum and James Marcum, Mr. Thomas Marcum knew that the top was bad where he sent Mr. Slone to work. However, without regard to the safety of Mr. Slone, Mr. Marcum sent Mr. Slone under the bad top as he did not want to suffer the financial loss which would occur if the mine had to be shut down long enough to comply with the appropriate safety statutes. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 194, 341, 375, 385).

Mr. Thomas Marcum planned to lie to the federal mine inspectors if they came to the mine while the illegal mining was going on. Mr. Marcum testified to a history of approximately 23 years in the coal mining industry and also testified that he was responsible for the underground

portion of the mine. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 193-194).

In the information charged against Mr. Marcum, as well as in the plea agreement, Mr. Marcum agreed that he willfully committed the safety violations. Thus, by Mr. Marcum's plea agreement, Mr. Marcum agreed that he meets the first requirement under the statute, that being that his actions were willful.

As the appellee agreed that his actions were willful, the only remaining question is whether such actions were malicious under 11 U.S.C. § 523(a)(6). As noted in *Geiger,* in order to be considered to be malicious, Mr. Marcum must have either desired to cause the consequences of his actions or believed that the consequences were substantially certain to result from such actions.

That Mr. Marcum was substantially certain that an injury would occur if the safety statutes were ignored is supported by the statement of Mr. James Marcum, Thomas Marcum's brother, who testified that they had ceased mining in portions of the mine due to the top being too bad and that he had advised Mr. Thomas Marcum on the day of the accident that the top was bad in the section where Mr. Slone was to be sent by Thomas Marcum. (DN 28, 39, 53, 54, Responses and Supplemental Documents Filed by McGee, 6/15/04, 6/28/04, 8/5/04, Apx. pg. 251-253, 375, 385). It is interesting to note that the appellee sent Mr. Slone into the deadly situation, rather than the appellee's brother, James Marcum.

The adversary plaintiff would submit that the actions of the defendant, Thomas Marcum, would constitute malicious actions. As noted by the U.S. Supreme Court in

Tinker v. Colwell, 193 U.S. 473 (1904), an action is malicious where the injurious consequences which follow the wrongful act are those which might naturally be expected to result from the wrongful act. As stated by the U.S. Supreme Court in *Tinker*,

> "'Malice' in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it may be true that in his unlawful act Freche was acquitted by hatred and revenge or passion towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice." *Tinker* at 486-487.

Mr. Marcum was convicted of a violation of a federal mine safety statute which was specifically designed to prevent rock falls which would cause the exact type of injury which we have in this case. The record makes clear that the Defendant, Thomas Marcum, acted wantonly against what any person of reasonable intelligence would know to be his duty. Such is especially true when one considers Mr. Marcum's long history in the coal mining industry and his obvious knowledge of the dangers inherent in roof falls in the coal mining industry.

As discussed before the Sixth Circuit, many states have felony murder statutes which do not require the person charged with murder to have the specific intent or desire to cause the consequences of his actions. The state of Kentucky's version of the felony murder statute is KRS 507.020 which provides, in relevant part, that one is guilty of murder when one, under circumstances manifesting

extreme indifference to human life, wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person. KRS 507.020(1)(b).

The classic example of felony murder is the situation in which the getaway driver is charged with murder where the accomplice kills a clerk in a store, even though the getaway driver had no intent or desire to cause the death of the clerk in the store.

Much as in the felony murder situation, the decedent, James Slone, was killed during the commission of a felony by the appellee, Thomas Marcum. The petitioner would submit that a difference should be made in the application of the law relative to a debt sustained in a simple malpractice negligence action, versus a debt sustained as the result of the commission of a felony.

The Sixth Circuit's decision results in a ruling of law that an individual has to actually intend the consequences of that individual's act before such act would prevent dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(6). Pursuant to the Sixth Circuit's reasoning, the fact that the debt was incurred as a result of the commission of a felony in which an individual was killed makes no difference. Therefore, the petitioner would respectfully request that this Court grant certiorari so as to address the application of 11 U.S.C. § 523(a)(6) to a debt incurred as a result of a death caused during the commission of a felony, versus a debt incurred in a simple negligence action.

CONCLUSION

This Court should grant certiorari so as to address whether 11 U.S.C. § 523(a)(6) prevents discharge of a debt incurred as the result of a willful commission of a felony.

Respectfully submitted,

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APPENDIX

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2006 WL 1478519

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-5808

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRENDA SLONE McGEE, *Plaintiff-Appellant,*	) ON APPEAL FROM) THE UNITED STATES) DISTRICT COURT FOR
v.	) THE EASTERN DISTRICT
THOMAS WAYNE MARCUM,	) OF KENTUCKY)) **OPINION**
Defendant-Appellee.	) (Filed May 23, 2006)

BEFORE: **DAUGHTREY, McKEAGUE**, Circuit Judges; and **McCALLA**.*

McKEAGUE, Circuit Judge. Plaintiff-appellant Brenda Slone McGee appeals the district court's decision upholding the bankruptcy court's finding that her judgment against defendant is a dischargeable debt under the bankruptcy code. For the reasons that follow, the order of the district court is affirmed.

I. BACKGROUND

On November 9, 1989, James Slone died in a "roof-fall" accident while working at a coal mine co-owned and operated by defendant, Thomas Wayne Marcum. Following

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* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee sitting by designation.

Slone's death, defendant pleaded guilty to criminal charges for violations of the Federal Mine Safety and Health Act ("FMSHA"), 30 U.S.C. § 820(d) (dealing with willful violations of mandatory health and safety standards) on November 10, 1993.

Plaintiff, acting individually and as Marcum's executrix, brought a wrongful death action against the defendant and others, alleging negligence and gross negligence. Following trial in Floyd Circuit Court, Floyd County, Kentucky, the plaintiff was awarded a judgment in the amount of $1,255,559.20 on April 11, 2002. On December 19, 2003, defendant filed for Chapter 7 bankruptcy. Plaintiff filed an adversary proceeding on March 19, 2004, challenging the discharge of the judgment pursuant to 11 U.S.C. § 523(a)(6). The bankruptcy court granted the defendant's motion for summary judgment, finding that there was no evidence in the record that defendant intentionally injured Slone. Plaintiff appealed this decision to the district court. The district court affirmed the ruling of the bankruptcy court on April 20, 2005. This timely appeal followed.

II. JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. 158(d) following the bankruptcy court's entry of the dismissal of plaintiff's adversary proceeding on August 12, 2004. This court has jurisdiction pursuant to 28 U.S.C. § 1291, because the district court entered a final decision when it affirmed the bankruptcy court's dismissal on April 20, 2005.

This court reviews an order granting summary judgment *de novo*. *Johnson v. Karnes*, 398 F.3d 868, 873 (6th

Cir. 2005). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added); *see also Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U .S. at 248. The court must evaluate each party's motion on its own merits and "draw all reasonable inferences against the party whose motion is under consideration." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad. Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991). When reviewing a summary judgment decision, an appellate court must confine its review of the evidence as submitted to the district court. *McClung v. Wal-Mart Stores, Inc.*, 270 F.3d 1007, 1011 (6th Cir. 2001).

III. ANALYSIS

Plaintiff brings three issues on appeal. First, she claims that there is a genuine issue as to whether the actions of Marcum, which resulted in the death of James Slone, were willful and malicious pursuant to 11 U.S.C. § 523(a)(6). Second, she alleges that the bankruptcy filings do not properly indicate the value of the appellee's

property, and third, she asserts the bankruptcy should have been converted to a Chapter 13 proceeding.

A. "Willful and Malicious Injury"

Under 11 U.S.C. § 523(a)(6), a debt must be the result of a "willful and malicious injury" in order to be nondischargeable in bankruptcy. In this case, both the bankruptcy court and the district court found that plaintiff's judgment was not for a "willful and malicious injury." The courts below found that defendant incurred this debt as a result of negligent and/or grossly negligent behavior, and found the debt to be dischargeable.[1]

Plaintiff contends that there is a genuine issue of material fact as to whether the actions of defendant were "willful and malicious" as described in 11 U.S.C. § 523(a)(6). She asserts that defendant was convicted of willfully violating the FMSHA, and this conviction shows that defendant "acted wantonly against what any person of reasonable intelligence would know to be his duty." *See id.* Plaintiff claims that, according to *Tinker v. Colwell*, 193 U.S. 473 (1904), malicious intent may be inferred where a party has acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty. *Id.* at 486-87. Relying on *Tinker*, plaintiff claims that

[1] The Supreme Court has ruled that res judicata does not apply to dischargeability proceedings in a bankruptcy court. *Brown v. Felsen*, 442 U.S. 127, 132 (1979). Thus, the state court judgment finding Marcum liable for negligence and gross negligence does not end the "willful and malicious injury" inquiry under the Bankruptcy Act. However, collateral estoppel may be asserted in a bankruptcy proceeding. *Spilman v. Harley*, 656 F.2d 224, 228 (1981). Marcum has not asserted estoppel in this case.

defendant's malicious intent can be inferred from his extensive background in the coal mining industry, his prior knowledge and recognition of the hazardous mining conditions, and his ensuing direction to Slone to work in these unsafe conditions.

The district court properly affirmed the bankruptcy court's discharge of the debt. The governing statute states, in relevant part:

> a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. § 523(a)(6). The Supreme Court interpreted this provision of the code in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In *Geiger*, the Court ruled that a debt arising from a medical malpractice judgment, which sounded in negligent or reckless conduct, did not fall within the statutory exception of 11 U.S.C. § 523(a)(6). *Id.* at 63-64. In so deciding, the Supreme Court stated:

> the word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury."

Geiger 523 U.S. at 57 (1998). Here, the conduct that led to Slone's death was not the result of a "willful injury." Even though defendant pleaded guilty to a willful violation of the FMSHA, there is no evidence in the record, nor does plaintiff allege, that defendant desired to injure Slone. As the district court noted, "[a] willful act is not the same thing as a willful injury." *In re: Marcum*, No. 04-496, slip op. at 4 (E.D. Ky. April 20, 2005) (hereinafter "slip op.").

The plaintiff claims that *Geiger* is distinguishable from the facts here, because the action in *Geiger* sounded in medical malpractice, and the defendant here pleaded guilty to criminal violations of a federal statute specifically intended to prevent the type of injury that happened to Slone. This argument is unavailing, however, because the proper inquiry under *Geiger* is whether the defendant inflicted a willful injury on the plaintiff. There is no evidence in the record to support the contention that Marcum willfully injured Slone.

The Sixth Circuit applied *Geiger* in *In re Markowitz*, 190 F.3d 455, 464 (6th Cir. 1999). In *Markowitz*, the plaintiff attempted to have his judgment against Markowitz for attorney malpractice deemed nondischargeable. Relying on *Geiger*, this court stated we "hold that unless 'the actor desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." *Id.* at 464 (citations omitted). The language used in *Markowitz* tracks the Restatement (Second) of Torts definition of an intentional tort. *See* Rest.2d Torts § 8A.

Here, the district court applied *Geiger* and *Markowitz*, finding no issue of material fact as to whether Marcum

committed an intentional tort. The allegations in the plaintiff's brief, including Marcum's knowledge of the dangerous conditions in the mine, and his willful violations of the FMSHA, do not rise to the level of intent required for an intentional tort. There is no evidence in the record that Marcum desired, intended, or was substantially certain that Slone's death would occur. The plaintiff never asserted any claim for an intentional tort, and the judgment against Marcum is for negligence and gross negligence only. Even though Marcum pleaded to a willful violation of the FMSHA, this does not equate to the "willful injury" requirement enunciated in *Geiger*. Thus, there is no issue of material fact as to whether Marcum's actions caused a "willful and malicious injury" as required by § 523(a)(6) and as interpreted by *Geiger* and *Markowitz*.

B. Valuation of Appellee's Property

The district court found that this issue was not included in the order entered by the bankruptcy court on August 12, 2004, and therefore, the issue was not properly before the district court. In fact, the plaintiff did not raise the issue in the adversary proceedings before the bankruptcy court. The issue is not properly before this court.

C. Chapter 13

Likewise, plaintiff's assertion that the bankruptcy should have been converted to a Chapter 13 bankruptcy was not presented to the bankruptcy court, nor is it discussed in the district court opinion. Further, plaintiff cites no legal authority in support of this proposition. The issue is not properly before this court.

V. CONCLUSION

For the aforementioned reasons, the ruling of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

CIVIL ACTION NO. 04-496-JBC

IN RE:

THOMAS WAYNE MARCUM,

Debtor

BRENDA SLONE MCGEE, **APPELLANT,**

V. **ORDER**

THOMAS WAYNE MARCUM, **APPELLEE.**

* * * * * * * * * * *

This action is before the court on appeal from an order entered by the United States Bankruptcy Court on August 12, 2004, granting summary judgment to the appellee, Thomas Wayne Marcum. The appellant, Brenda Slone McGee, asserts that the Bankruptcy Court relied on a factually distinct case resulting in an erroneous determination that the debtor did not willfully or maliciously injure James Slone. Ms. McGee further argues that there is a genuine issue of fact remaining in dispute as to whether the wrongful death judgment she obtained against the debtor in state court should have been discharged pursuant to 11 U.S.C. § 523(a)(6). The appellant also claims that the debt cannot be discharged due to the discrepancy between the appraisal value and the purchase price of the debtor's home and that the bankruptcy proceeding should be converted to a Chapter 13 action in light of the debtor's "substantial monthly income." However, the appellant's allegations regarding the debtor's property and salary were not part of August 12, 2004, order of the

Bankruptcy Court and thus are not properly before the court.

Standard of Review

On appeal, the district court reviews the legal conclusions made by the Bankruptcy Court under a *de novo* standard of review. Fed. R. Bankr. P. 8013. The Bankruptcy Court's factual findings are reviewed for clear error. *Id.*; *In re Kennedy*, 249 F.3d 576, 579 (6th Cir. 2001).

Relevant Facts

The Bankruptcy Court's factual findings remain largely unchallenged and are relied upon by the court. The debtor co-owned and operated a mine when a roof fall occurred, killing James Slone (an employee of the mining company) on or about November 9, 1989. Mr. Marcum pled guilty to criminal charges of violations of the Federal Mine Safety and Health Act, 30 U.S.C. § 820(d) (willful violations of mandatory health and safety standards) on or about November 10, 1993. Ms. McGee, Mr. Slone's executrix, filed a wrongful death action against the debtor and others in or about October 1990. She brought claims of negligence and gross negligence against Mr. Marcum. She was awarded a judgment in the amount of $1,255,559.20 on April 11, 2002. On December 19, 2003, Mr. Marcum filed for bankruptcy pursuant to Chapter 7 of the U.S. Bankruptcy Code. Ms. McGee filed an adversary proceeding on March 19, 2004, challenging Mr. Marcum's ability to discharge the judgment against him under 11 U.S.C. § 523(a)(6). The Bankruptcy Court granted summary judgment in the debtor's favor on August 12, 2004, finding no evidence in the record to support Ms. McGee's claim

that Mr. Marcum intentionally injured the decedent, James Slone.

Legal Analysis

In order for a debt to be nondischargeable under § 523(a)(6), the debt must be "for willful and malicious injury."[1] This exemption from discharge is confined to debts based on intentional torts. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The Sixth Circuit has enunciated a test for applying the exception, limiting nondischargeability under § 523(a)(6) to those circumstances when "'the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it." *In re Markowitz*, 190 F.3d 455, 464 (6th Cir. 1999) (citation omitted). *See In re Romano*, No. 01-1822, 2003 WL 731723, at (6th Cir. March 3, 2003).

The appellant argues that a material distinction differentiates *Kawaauhau* from this case because *Kawaauhau* involved a debtor who committed only negligence and medical malpractice, whereas in this case, the debtor committed a criminal act. Ms. McGee argues that this distinction requires analysis more intensive than that engaged in by the Bankruptcy Court. However, the fact that the debtor's conduct constituted a criminal violation is not relevant to the issue of willful and malicious conduct. *See In re Romano*, 2003 WL 731723, at *6 at n. 6. The appropriate inquiry is whether the debtor wanted to

[1] The section reads: "(a) A discharge under . . . this title does not discharge an individual debtor from any debt – (6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

cause injury to Mr. Slone, or believed that such an injury was substantially certain to result from the debtor's actions.[2] The appellant does not allege that the debtor desired to injure Mr. Slone. The appellant's brief instead alleges that Mr. Marcum "was well aware of the danger to which he was subjecting Mr. Slone" and that Mr. Marcum acted "without regard to the safety of Mr. Slone." These are descriptions of grossly negligent or reckless behavior, but do not rise to level of substantial certainty of injury. Ms. McGee further states that a witness testified that Mr. Marcum was advised that the "top was bad" in the mine. Despite this warning, she claims that Mr. Marcum sent Mr. Slone to work in the mine. The parties dispute whether Mr. Marcum knew that the "top was bad" in the exact area where Slone was to work.

Mr. Marcum was adjudged liable for negligence and gross negligence and pled guilty to violating the Federal Mine Safety and Health Act. While the violations of that Act were willful, no willful injury was charged or admitted. A willful act is not the same thing as a willful injury. *See Kawaauhau, supra; In re Markowitz, supra; In re Romano, supra*. In this case, there is simply no evidence of a willful injury, and the Bankruptcy Court's order will be affirmed. Accordingly,

IT IS ORDERED that the Bankruptcy Court's order granting summary judgment in favor of the appellee is **AFFIRMED** and the appellant's appeal is **DISMISSED**.

---

[2] It is unclear whether the debtor would have to intend the precise consequences of his act, in this instance Mr. Slone's death, but as discussed in the remainder of the court's opinion, there is no evidence that Mr. Marcum intended even an injury to Mr. Slone.

IT IS FURTHER ORDERED that this matter is **STRICKEN** from the court's active docket.

Signed on April 20, 2005

/s/ Jennifer B. Coffman
JENNIFER B. COFFMAN,
JUDGE U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

[SEAL]

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE:	THOMAS WAYNE MARCUM DEBTOR	Chapter 7 CASE NO. 03-54325
BRENDA SLONE MCGEE		PLAINTIFF
VS.		ADV. NO. 04-5453
THOMAS WAYNE MARCUM		DEFENDANT

FINDINGS FACT
AND
ORDER OF DISMISSAL

* * * * * * *

This matter came to be heard on the motion of the Defendant/Debtor (Thomas Wayne Marcum) hereinafter referred to as "Marcum") for Summary Judgment.

FINDINGS OF FACT

The court makes the following findings of fact:

1. In the mid 1980's Marcum was the co-owner and operator of a coal mine in eastern Kentucky.

2. On or about 9 November 1989 a roof fall occurred at that mine.

3. That roof fall took the life of James Slone (an employee of the mining company).

4. On or about 18 October 1990 his Executrix (Brenda Slone, now Brenda Slone McGee, hereinafter referred to as "Slone") filed suit against various defendants for the

wrongful death of James Slone in the Commonwealth of Kentucky, Floyd Circuit Court and was assigned case no. 90-CI-816. That complaint sounded in negligence. Marcum was not named as a party defendant to that action.

5. On or about 10 November 1993 Marcum plead guilty to violations of the Federal Mine Safety and Health Act (30 U.S.C. Section 820(d) (willful violations of mandatory health and safety standards for underground coal mines set forth in the Federal Mine Safety and Health Act of 1977) in the United States District Court for the Eastern District of Kentucky, Pikeville Division in case no. 93-56.

6. On or about 9 August 1994 Slone filed and [sic] amended complaint asserting a claim against Marcum and others for negligence in the death of James Slone. A second amended complaint against Marcum, and other, was filed on 30 August 1994 for the wrongful death of James Slone. That second amended complaint alleged wilful violations of the Mine Safety and Health Act. All claims being asserted in the action styled Commonwealth of Kentucky, Floyd Circuit Court, Case no. 90-CI-816, Brenda Slone vs. Prestonsburg Contracting, et. al.

7. This matter proceeded to trial before the court and a judgment was entered on 11 April 2002 against Marcum and others for $1,255,559.20. This Judgment is for negligence and gross negligence only.

8. There have not been assertions of any intentional tort claims against Marcum.

10. On or about 19 December 2003 Marcum sought relief under chapter 7 of the U.S. Bankruptcy Code for the

Eastern District of Kentucky, Lexington Division, and was assigned Case No. 03-54325.

11. The first meeting of creditors was originally scheduled for 21 January 2004 and was actually conducted on that date.

12. This adversary proceeding was filed on 19 March 2004.

13. After various preliminary matters Marcum filed a motion to dismiss and a motion for summary judgment. The motion to dismiss has been previously overruled.

14. This adversary proceeding challenges Marcum's ability to discharge the 11 April 2002 Judgment solely on the basis of 11 U.S.C. 523(a)(6). No other basis for challenging discharge has been asserted by the Plaintiff.

APPLICABLE LAW

The applicable law controlling this case is found in 11 U.S.C. 523(a) (6) and as interpreted by the United States Supreme Court in *Kawaauahau vs. Geiger*, 118 S.Ct. 974 (1998) and the Sixth Circuit Court of Appeals in *In re Markowitz*, 190 F.3d 455 (6th Cir. 1999) and *In re Romano*, 59 Fed.Appx 709, 203 WL 731723 (6th Cir. 2003).

The burden is on the plaintiff to establish that Marcum desired the consequences of his action or that he knew the consequences were substantially certain to result from his actions. The Supreme Court's language in *Geiger* is clear that for a debt to be non-dischargable under 523(a)(6) it must be found to be an intentional tort.

DECISION

In the case at bar Slone's original complaint, her first amended complaint against Marcum (et. al.) and her second amended complaint against Marcum (et. al.) all sound in negligence and do **not** assert any claim for an intentional tort. The Judgment against Marcum and other [sic] makes findings of negligence and gross negligence only. There is no finding that Marcum intended the consequences of his action or that the injuries were substantially certain to result from Marcum's actions.

The plaintiff (in the state court proceedings) obtained judgment against Marcum based upon his plea to wilful violations of the Mine Safety and Health Act. Those charges and the resulting plea agreement would have existed even if no injury had occurred. The criminal conviction herein establishes only a wilful act by Marcum. This does not establish a wilful injury.

Since the complaint and all amended complaints assert only claims for negligence and the resulting judgment is solely for negligence (and gross negligence); and since, there was never asserted any claim against Marcum for any intentional tort; and since, there were no state or federal criminal charges asserted against Marcum for any wrongful death or wrongful injury; and since, Marcum's plea for violation of the Federal Mine Safety and Health Act establishes only a wilful act (as opposed to a wilful injury) and not an intent to injure James Slone or that such injury would be substantially certain to result from the actions of Marcum the plaintiff has not meet [sic] her burden.

CONCLUSION

It is further the finding of the court that the plaintiff's claims herein (and specifically the judgment in the state court) are for negligence and not for an intentional tort. Accordingly the debt is dischargable in bankruptcy and is not an exception to discharge pursuant to 11 U.S.C. 523(a)(6).

IT IS THE ORDER OF THIS COURT THAT THE PLAINTIFF HAS NOT SUSTAIN [sic] HER BURDEN required under 11 U.S.C. 523(a)(6) and accordingly the Plaintiff's adversary proceeding herein is DISMISSED WITH PREJUDICE. This is a final and appealable order.

It is further ordered that pursuant to Local Rule 9022-1(c), David G. Perdue shall serve on each party designated to receive this order a copy of this order pursuant to Local Rule 9022-1(a) and shall file with the court a certificate of service of the order upon such parties within ten (10) days of service.

Distribution List:

U.S. Trustee
100 East Vine Street
Suite 803
Lexington, KY 40507

Hon. Robert J. Brown
P.O. Box 12021
Lexington, KY 40579-2021

Thomas W. Marcum
1850 Pilot View Road
Winchester, KY 40391

Hon. Leonard Stayton
P.O. Box 1386
Inez, KY 41224

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
[SEAL] ***Joseph M. Scott, Jr.***
Bankruptcy Judge
Dated: Thursday, August 12, 2004
(jms)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE: THOMAS WAYNE MARCUM Debtor	Chapter 7 Case No. 03-54325
BRENDA SLONE MCGEE	PLAINTIFF
VS.	ADV. NO. 04-5453
THOMAS WAYNE MARCUM	DEFENDANT

CERTIFICATE OF SERVICE

*** *** *** ***

The undersigned certifies, pursuant to Local Rule 9022-1(C), a true and accurate photocopy of the Order entered on the 12 August 2004 in the above-referenced matter was mailed or served electronically via the CM/ECF system of the United States Bankruptcy Court to:

U.S. Trustee
100 East Vine Street
Suite 803
Lexington, KY 40507

Hon. Robert J. Brown
P.O. Box 12021
Lexington, KY 40579-2021

Thomas W. Marcum
1850 Pilot View Road
Winchester, KY 40391

Hon. Leonard Stayton
P.O. Box 1386
Inez, KY 41224

And all creditors affected hereby,
this 12th day of August 2004.

/s/ [Illegible]
Hon. David G. Perdue
107 South Main Street
P.O. Box 968
Winchester, KY 40392-0968
(859) 745-1942
Attorney for
Debtor/Defendant

FLOYD CIRCUIT COURT
C.A. NO.: 90-CI-816
DIVISION NO. II

BRENDA SLONE McGEE, individually, and BRENDA SLONE McGEE, as executrix of the estate of JAMES SLONE — PLAINTIFF

V — **FINAL JUDGMENT**

PRESTONSBURG CONTRACTING, TODCO, INC., THOMAS MARCUM, MARION DALTON, JR., GREAT FIDELITY LIFE INSURANCE CO., BURL JOHNSON, and BENNIE BREWER — DEFENDANTS

This matter having come before the court on February 12, 2002 for trial, after hearing evidence and reviewing all evidence and pleadings of record, this court hereby reaffirms the previous summary judgment on the issue of liability against Thomas Marcum and Marion Dalton, Jr., finding that Thomas Marcum and Marion Dalton, Jr. were grossly negligent with such negligence wrongfully resulting in the death of the decedent, James Slone, on November 9, 1989. Furthermore, the previous default judgments entered by this Court against Prestonsburg Contracting, and Todco, Inc. are again affirmed, with a like finding that said corporations were grossly negligent with such negligence wrongfully resulting in the death of the decedent, James Slone, on November 9, 1989.

The Defendants have attempted to set up a release signed on December 27, 1989 by the Plaintiff, Brenda Slone McGee, as a bar to the bringing of this action. The

Plaintiff has asserted that said release was secured by fraud and/or deception.

This Court finds that the Plaintiff, Brenda Slone McGee, has proved by clear, unequivocal, and convincing evidence that the release signed by Brenda Slone on December 27, 1989 was obtained by fraud and/or deception. The Court takes specific notice that request for admissions by the payor of the settlement, Great American Life Insurance Company, state that no release was requested or required from the Plaintiff, Brenda Slone, in order for the Plaintiff, Brenda Slone, to receive the payment of $100,000, paid by Great American Life Insurance Company. Furthermore, the Court takes note that the payment was pursuant to a policy of life insurance, not a policy of liability insurance.

Ms. Slone has also testified that it was misrepresented to her by Benny Brewer and Burl Johnson that the document which she was signing would not be a release of any other claims which she might have, but was only so that Ms. Slone could receive the proceeds of the life insurance policy. Furthermore, the amount of the payment, $100,000, would be an inadequate amount so as to pay for the damages incurred by the Plaintiff and the estate of the decedent for the death of the decedent, James Slone. Thus, as previously stated, this Court finds that the Plaintiff has proven by clear, unequivocal, and convincing evidence that the release signed by Brenda Slone on December 27, 1989 was secured by means of fraud and/or deception. Thus, the release signed by Brenda Slone on December 27, 1989 is set aside and held for naught.

This Court has found that the Defendants, Thomas Marcum, Marion Dalton, Jr., Prestonsburg Contracting

and Todco, Inc., were grossly negligent, with such negligence resulting in the death of the decedent, James Slone. Therefore, as a matter of law, punitive damages are assessed against Thomas Marcum, Marion Dalton, Jr., Prestonsburg Contracting, and Todco, Inc.

This Court further finds that the Defendants, Thomas Marcum, Marion Dalton, Jr., Prestonsburg Contracting, and Todco, Inc., were acting in concert, with such actions resulting in the death of the decedent, James Slone. Therefore, the Defendants, Thomas Marcum, Marion Dalton, Jr., Prestonsburg Contracting, and Todco, Inc., are jointly and severally liable for all damages awarded herein.

WHEREFORE, it is ORDERED and ADJUDGED that damages are awarded to the Plaintiff, Brenda Slone McGee, as executrix of the estate of James Slone, from Thomas Marcum, Marion Dalton, Jr., Prestonsburg Contracting, and Todco, Inc., as follows:

Funeral expenses	$ 4,700.00
Reimbursement for bounced wage check	$ 859.24
Loss of earning capacity	$ 750,000.00
Punitive damages	$ 300,000.00

It is further ordered that the Plaintiff, Brenda Slone McGee, is awarded damages from Thomas Marcum, Marion Dalton, Jr., Prestonsburg Contracting, and Todco, Inc. as follows:

Consortium	$ 200,000.00

The total of all damages awarded to Brenda Slone McGee and Brenda Slone McGee as executrix of the estate of James Slone is $1,255,559.20 with the Defendants, Thomas Marcum, Marion Dalton, Jr., Prestonsburg

Contracting, and Todco, Inc. being jointly and severally liable for said damages.

This is a final and appealable judgment and there is no just cause for delay of entry of same.

ORDERED and ADJUDGED this 11th day of April, 2002.

/s/ John David Caudill
HON. JOHN DAVID CAUDILL
JUDGE, FLOYD CIRCUIT COURT

Hon. Leonard Stayton
Hon. Jeff Woods
Hon. Richard Fitzpatrick
Hon. Leo Marcum
Hon. John Chafin
Hon. Robert Templeton

(2)

No. 06-254

Supreme Court, U.S.
FILED
SEP 2 2 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENDA SLONE McGEE, individually,
And BRENDA SLONE McGEE, as executrix
of the estate of JAMES SLONE,

Petitioner,

v.

THOMAS WAYNE MARCUM,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a debt incurred through the entry of a state court judgment finding only negligence and "gross negligence" nondischargeable under the provisions of 11 U.S.C. § 523(a)(6)?

LIST OF ALL PARTIES

The list of all parties set forth at page ii of the petition is correct.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDER ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The list of citations set forth at p. 1 of the petition is correct.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The statement appearing at p. 1 of the petition is correct.

COUNTER-STATEMENT OF THE CASE

A Kentucky state court judgment was entered on April 22, 2002, against the respondent, Thomas Wayne Marcum ("Marcum") in a wrongful death action filed by the petitioner, Brenda Slone McGee ("Ms. McGee"), the widow of James Slone, who was killed in a mining accident in Floyd County, Kentucky. (Petition, App. pp. 21-24). The judgment found negligence and gross negligence. (Petition, App. pp. 22-23). The action against Marcum did not allege that he committed any intentional tort, and the court made no finding that he had committed an intentional tort. (Petition, App. pp. 21-24).

ARGUMENT

The opinion of the United States Court of Appeals for the Sixth Circuit is correct, there is no conflict between the

circuits, nor any other reason for this court to review this opinion, and this Court should not grant the pending petition for writ of certiorari.

The opinion and order of the bankruptcy court dismissing the underlying adversary proceeding explains the law applicable to this case with commendable brevity and clarity:

> The applicable law controlling this case is found in 11 U.S.C. 523(a)(6) and as interpreted by the United States Supreme Court in *Kawaauahau vs. Geiger*, 118 S.Ct. 974 (1998)[1] and the Sixth Circuit Court of Appeals in *In re Markowitz*, 190 F. 3d 455 (6th Cir. 1999) and *In re Romano*, 59 Fed.Appx. 709, 2003 WL 731723 (6th Cir. 2003).
>
> The burden is on the plaintiff to establish that Marcum desired the consequences of his action or that he knew the consequences were substantially certain to result from his actions. The Supreme Court's language in *Geiger* is clear that for a debt to be non-dischargable under 523(a)(6) it must be found to be an intentional tort.

(Petition, App. 16).

The Sixth Circuit opinion herein adopted this reasoning in its entirety, holding:

> Here, the district court applied *Geiger* and *Markowitz*, finding no issue of material fact as to whether Marcum committed an intentional tort. The allegations in the plaintiff's brief, including Marcum's knowledge of the dangerous conditions

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[1] Though not cited by the bankruptcy court, the official reference to this case is 523 U.S. 57.

> in the mine, and his willful violations of the FMSHA, do not rise to the level of intent required for an intentional tort. There is no evidence in the record that Marcum desired, intended, or was substantially certain that Slone's death would occur. The plaintiff never asserted any claim for an intentional tort, and the judgment against Marcum is for negligence and gross negligence only. Even though Marcum pleaded to a willful violation of the FMSHA,[2] this does not equate to the "willful injury" requirement enunciated in *Geiger*. Thus, there is no issue of material fact as to whether Marcum's actions caused a "willful and malicious injury" as required by § 523(a)(6) and as interpreted by *Geiger* and *Markowitz*.

(Petition, App. 6-7).

The Sixth Circuit correctly held that, because Marcum had not been accused of any intentional tort, the decision of the district court and the underlying decision of the bankruptcy court were properly decided. This court should not review that decision, both because it is correct, and because the plaintiff has not articulated any reason for this court to review its decision in the *Geiger* case, which is clearly on point and controlling.

The *Geiger* case involved a claim of medical malpractice in which a patient sought treatment from a physician for an infection of her foot. Though he knew that intravenous antibiotic treatments would be more effective, Dr. Geiger instead prescribed oral penicillin tablets to, as he alleged, reduce the cost of treatment. While Dr. Geiger was

---

[2] Federal Mine Safety and Health Act, 30 U.S.C. § 820(d).

on vacation, other, presumably more able, physicians began a more aggressive plan of treatment, including the referral of the patient to specialists who had expertise to treat her condition. When Dr. Geiger returned from vacation, he discontinued all these treatments, and resumed the use of oral penicillin tablets. The result of his malpractice was that the infection spread, ultimately causing the patient's leg to be amputated. *Geiger*, supra, 523 U.S. at 59.

The jury found Dr. Geiger negligent, and awarded the patient approximately $355,000 in damages, which Dr. Geiger then sought to discharge in bankruptcy. *Geiger*, supra, 523 U.S. at 59-60. The bankruptcy court held the debt to be non-dischargeable, and that holding was upheld by the district court. The United States Court of Appeals for the Eighth Circuit, however, reversed the decision, holding that however reprehensible Dr. Geiger's actions were, they were done negligently, rather than as an actual attempt to harm his patient.

In reviewing the decision of the court of appeals, this Court then addressed the question of whether Dr. Geiger's outrageously negligent conduct rose to that necessary to meet the standards of Section 523(a)(6) of the Bankruptcy Code, and concluded that they did not.

The opinion stated:

> We confront this pivotal question concerning the scope of the "willful and malicious injury" exception: Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury (as the Kawaauhaus urge), or only acts done with the actual intent to cause injury (as the Eighth Circuit ruled)?

> The words of the statute strongly support the Eighth Circuit's reading.

Geiger, supra, 523 U.S. at 61 (footnote omitted).

> Section 523(a)(6) states:
>
> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

This Court held that the words "willful" and "malicious" modify the word "injury." This Court held that Section 523(a)(6) only provides for the non-dischargeability of debts that result from actions that were INTENDED to harm another entity or its property. It does not apply to debts arising from actions which were willfully done, but which were NOT intended to harm another person. *Geiger*, supra, 523 U.S. at 61-62. Section 523(a)(6) applies only where the harm itself is the motive for the action, NOT where the harm was an unintended consequence of a negligent act.

Ms. McGee attempts to distinguish the *Geiger* case by noting that the negligent conduct of Mr. Marcum led to his criminal conviction, just as she did in the underlying Sixth Circuit appeal. (Petition, p. 8). Ms. McGee claims that, because of this distinction, *Geiger* is inapplicable because it involves only "a malpractice judgment based upon simple negligence against her physician for improper treatment. No allegation was made of any type of criminal intent or action on the part of the physician in *Geiger*." (Petition, p. 7).

Ms. McGee goes on to note that the "statute which Mr. Marcum was convicted of violating is designed to prevent exactly the type of situation which occurred when Mr. Marcum willfully and illegally sent Mr. Slone under unprotected roof in an underground coal mine." (Petition, p. 8)

Ms. McGee has, unwittingly perhaps, defined the concept of negligence per se. Negligence consists of the owing of a duty by one person to another, and then failing to fulfill that duty.[3] Here, as in all negligence per se cases, the standard of duty is set by a penal statute, and the violation of that penal statute constitutes negligence per se under Kentucky law. *Alderman v. Bradley*, 957 S.W.2d 264, 267 (Ky.App. 1997).

There is no allegation that Mr. Marcum intended to harm Mr. Slone. In its opinion and order, the bankruptcy court accepted the parties' stipulation that the judgment entered against Mr. Marcum was for "negligence and gross negligence only" and that there "was never asserted any claim against Marcum for any intentional tort." (Petition, App. 17). The bankruptcy court went on to hold that "The criminal conviction herein establishes only a willful act by Marcum. This does not establish a wilful injury." (Petition, App. 17).

The allegation is simply that Marcum violated a duty owed to Slone. That duty was, as in *Alderman*, defined by a statute. Marcum and others were owners and operators

---

[3] "[N]egligence can exist only if the appellee owed the appellant a duty. Stated differently, if no duty existed, there could have been no breach of a duty and therefore no actionable negligence." *Penco, Inc. v. Detrex Chemical Industries, Inc.*, 672 S.W.2d 948, 951 (Ky.App. 1984).

of a corporation that was in the business of mining coal. There were violations of the applicable provisions of the Federal Mine Safety and Health Act, 30 U.S.C. § 820(d). While there is no evidence in the record concerning motive, the natural assumption is that Marcum's motive was to mine more coal than could be mined by strict compliance with the act, or to mine it more cheaply, just as Dr. Geiger's reason for limiting his treatment of his patient was to reduce the cost of that treatment. Dr. Geiger was negligent, and Marcum was negligent. However, neither intended to hurt anyone.

Ms. McGee's citation of an older Supreme Court case, *Tinker v. Colwell*, 193 U.S. 473 (1904), brings the issues sharply in focus. In that case, a husband obtained a judgment against another man for having "criminal conversation" with his wife. This Court held that the very act of "criminal conversation" or adultery was a willful tort, committed with at least the legal fiction that the wife (who was presumed not to be competent to give consent) was not a willing participant, and therefore, an intentional tort. *Tinker*, supra, 193 U.S. at 481-82.

The opinion in *Geiger* clearly distinguishes the *Tinker* opinion, holding:

> *Tinker* thus placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding. That decision, we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be "for willful and malicious injury."

Geiger, supra, 523 U.S. at 63.

In *In re: Markowitz*, 190 F.3d 455 (6th Cir. 1999), the Sixth Circuit recognized *Geiger* as controlling precedent, noting that, under the *Geiger* standard, a tortfeasor "must will or desire harm, or believe injury is substantially certain to occur as a result of his behavior." *Markowitz*, supra at 455, n.10. Here, there is absolutely no evidence that Mr. Marcum either desired to harm Mr. Slone or that he knew that an injury to Mr. Slone was "substantially certain." (Petition, App. 7).

Thus, *Geiger* states the applicable rule of law, and the fact that this case involves negligence per se does not change the rule at all. The petitioner waves the criminal conviction of Marcum as a bloody shirt, claiming that it entitles her to more than the state court awarded her: a judgment for negligence only. If this court were to accept the rationale offered by the petitioner, every case of negligence per se, including automobile cases in which one driver exceeded the speed limit or ignored a traffic signal, would automatically produce a negligence judgment that is non-dischargeable in bankruptcy, and that novel rule would fly in the face of the well-established case law set out herein.

CONCLUSION

This court should not grant the petition for certiorari, and should allow the Sixth Circuit opinion to stand.

Respectfully submitted,

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